WAN MOHD SOFIAN WAN MD SAAD

v.

MBF FINANCE BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: S2-22-824-1998]
7 OCTOBER 1999

CIVIL PROCEDURE: *Appearance - Late appearance - Effect of - Whether filing of memorandum of appearance may be set aside - Rules of the High Court 1980, O. 12 r. 5(2)*

CIVIL PROCEDURE: *Default judgment - Written notice - Whether given - Effect of failure to give notice - Application to set aside judgment obtained without giving notice - Legal Profession (Practice and Etiquette) Rules 1978, r. 56*

The plaintiff served his writ and statement of claim on the defendant on 9 February 1999. The defendant filed a memorandum of appearance on 19 February 1999, *ie*, the day it was dated, but served it on the plaintiff on 18 February 1999. The plaintiff then filed an application to set aside the memorandum of appearance and to obtain judgment against the defendant. The SAR allowed the plaintiff's application and the defendant appealed.

Held:

[1] As judgment had not yet been entered when the defendant entered its appearance, the only effect of the late appearance of the defendant was that he could not, without the consent of the court, serve a defence or do anything else any later than as if he had entered appearance on time.

[2] The order granted by the SAR was against the existing rules as the plaintiff had no right under the rules of court to set aside the filling of the memorandum of appearance.

[3] The plaintiff ought to have given the defendant a notice under r. 56 Legal Profession (Practice and Etiquette) Rules 1978.

[Appeal allowed.]

Case(s) referred to:
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 1, O. 3 r. 2, O. 12 rr. 4, 5, O. 13 r. 2
Legal Profession (Practice and Etiquette) Rules 1978, r. 56

For the appellant/defendant - Loh Siew Cheang (Chua Eng Siong with him); M/s Cheang & Ariff
For the respondent/plaintiff - V Rajadevan; M/s Rajadevan & Assoc

Reported by Izzaty Izzuddin

JUDGMENT

RK Nathan J:

Facts

The plaintiff commenced this action against the defendant claiming general damages amounting to RM1 million, interests, exemplary and additional damages, and costs for alleged negligence on the part of the defendant in issuing/executing/attempting to execute a warrant of arrest under a judgment debtor summons in respect of Kuala Lumpur Magistrate Court Case No. J76-2840-1996 and also for defamation. The writ of summons with the statement of claim was filed on 22 December 1998. There is no affidavit of service filed by the plaintiff. However, the defendant has magnanimously admitted that the same was served on its firm of solicitors at their request on 9 February 1999. The defendant's memorandum of appearance was dated 19 February 1999 and was also filed on the same day. However, by a letter dated 19 February 1999 the defendant had in fact served the plaintiff with a copy of the memorandum of appearance on 18 February 1999. In other words a copy was served even before it was filed on 19 February 1999. Subsequently the defendant filed and served its defence on 3 March 1999.

In the meantime on 1 March 1999 the plaintiff filed an application to set aside the memorandum of appearance dated 19 February 1999 and to obtain judgment for the sum of RM1 million which the plaintiff had purely in its pleadings assessed, as its loss by way of general damages.

The learned Senior Assistant Registrar (SAR) after hearing arguments set aside the Memorandum of Appearance and gave the plaintiff liberty to enter judgment for the sum of RM1 million as general damages with costs, on 5 July 1999. The defendant thus appealed against that decision. In the meantime *ex abdundante cautaela* the defendant also applied to set aside the order of the SAR dated 5 July 1999. As to whether the defendant can proceed by way

of this dual pronged approach is not my concern since both parties did not address me on this issue. Instead they have asked that I take both enclosures, namely, encl. 10 (this appeal) and encl. 12 (the application to set aside the judgment) together. I propose to deal with the appeal which should therefore put to rest encl. 12.

The Appeal

The writ and statement of claim was served on the defendant on 9 February 1999. Pursuant to O. 12 r. 4 of the Rules of the High Court 1980 (the RHC) the time limited for entering an appearance within the jurisdiction is eight days and pursuant to O. 3 r. 2 the eight days begin to run from 10 February 1999. Therefore the last day for entering appearance was 18 February 1999. Since 16 February 1999 and 17 February 1999 were public holidays and since the 18th was a working day, the public holidays would therefore have no effect in extending the period for entering appearance. Whilst it is admitted that the plaintiff only entered appearance by filing with the registry, on 19 February 1999, he had served a copy on 18 February 1999. I shall first deal with the issue of filing the Memorandum of Appearance late.

Whilst the defendant had by its own admission entered appearance a day late, there is no provision in the RHC that disallows a defendant from doing so. The rule governing late entering of appearance is O. 12 r. 5 which reads as follows:

> 5 (1) A defendant may not enter an appearance in an action after judgment has been entered therein except with the leave of the Court.
>
> (2) Except as provided by paragraph (1), nothing in these rules or any writ or order thereunder shall be construed as precluding a defendant from entering an appearance in an action after the time limited for appearing, but if a defendant enters an appearance after that time, he shall not, unless the Court otherwise orders, be entitled to serve a defence or do any other thing later than if he had appeared within that time.

Therefore it is clear that a defendant is only precluded from entering appearance after judgment has been entered unless he has the leave of the court. But in this case, the plaintiff failed to act with promptitude. The only effect upon a defendant who enters appearance late is that he cannot, without the consent of the court, serve a defence or do anything else any later than as if he had entered appearance within time. Therefore it is my judgment that the defendant was perfectly entitled to enter the late appearance since judgment had not as yet been taken on that date.

Plaintiff's Failure To Act Promptly

This is clearly a claim for unliquidated damages. Merely by quantifying a claim for damages which in the opinion of the plaintiff or his legal adviser amounted to a figure of RM1 million did not by any stretch of the imagination entitle the plaintiff to be given the liberty to enter judgment for that amount. The right of the plaintiff in respect of his unliquidated claim for damages although fixed by him is governed by O. 13 r. 2 of the RHC which reads as follows:

> 2. Where a writ is indorsed with a claim against a defendant for unliquidated damages only, then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any.

Therefore the defendant ought to have immediately upon the expiration of the time fixed for entering of appearance, obtained interlocutory judgment against the defendant and sought another date to assess damages. The rationale is simple. A party might not wish to contest liability but would most certainly want to contest the award of damages.

But in this case what the plaintiff did was to apply to set aside the filing of the appearance not the service thereof. This is confirmed by the plaintiff in his submission. This the plaintiff had no right to do. Whilst the plaintiff had in his affidavit in support of his application to set aside the filing of the Memorandum of Appearance, stated that the said Memorandum of Appearance was served on him on 18 February 1999, his application in no way contended that he was seeking to set aside the service and not the filing of the Memorandum of Appearance. The order granted by the SAR was against the existing rules.

There is another issue the plaintiff will have to face. Rule 56 of the Legal Profession (Practice and Etiquette) Rules 1978 reads as follows:

> 56. Judgment by default.
>
> Where the name of the advocate and solicitor or his firm appears on the Court record or the fact of representation is known to the other side, no advocate and solicitor representing the other party to the proceedings shall enter Judgment by Default against the client of the first-named advocate and solicitor or to take advantage of delay in pleading or filing documents in the nature of pleadings or in taking any necessary steps or in complying with any other proceedings by such first-named advocate and solicitor, unless he shall have given to such first-named advocate and solicitor written notice of his intention to do so, and seven days shall have elapsed after the delivery of such notice to the first-named advocate and solicitor.

Clearly the plaintiff ought to have given the defendant such notice. There is no evidence before me of any such notice being given at all. The legal profession in Malaysia is governed by the Legal Profession (Practice and Etiquette) Rules 1978 and the Legal Profession Act 1976 (the Act). Various subsidiary legislation in the form of rules have been gazetted under the rules-making powers contained in the said Act. The object of these rules is to ensure that advocates and solicitors conduct their affairs in an honourable and fair manner befitting the practice of law. Therefore in an application to set aside a judgment obtained in breach of any of the said rules or the provisions of the Act the court ought to consider such a breach.

There is no purpose in considering the other issues raised by the plaintiff with respect to irregularities in the light of the clear pronouncement of the Federal Court in *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 765 FC wherein the court held that orders and judgments made or entered by a court, in private litigation, in the exercise of its coercive power upon the default of a party to a suit, even when made or entered in breach of a rule of court or of practice, are merely irregular. They are not nullities. Any proceedings commenced, or any order or judgment obtained, in breach of a rule of court is always subject to the curative power of the court available under O. 2 r. 1 of the RHC.

The appeal is allowed with costs.